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Judicial Activism and women rights: A Critical Analysis

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It is not new to anyone that since the medieval ages women have constituted a large part of the vulnerable section of society. It would not be wrong to say that women have been a victim of patriarchal society since the very beginning and there have to sacrifice their rights and interest for the rights and interests of their families. After the enactment of the constitution, one ray of hope emerged in the form of the judiciary to tackle the suffering of women and provide them with their rights. By and large, the judiciary has always come in the front to protect women's rights and has worked more progressively than the legislature to uphold the rights of women. But it should not be construed that there are no more challenges to the protection of women's rights in the country. In this research work, the author will critically examine the role of the judiciary to protect and uphold women's rights and will simultaneously shed light on current challenges to the rights of women in India.

Keywords: *women rights, constitution, judiciary, fundamental rights.*

INTRODUCTION

Every human civilization is bound to have social differentiation and gender differentiation is one among them. Due to gender differentiation, it would not be wrong to submit that, in a patriarchal society such as India, women have to undergo a lot of suffering and discrimination in every aspect of their lives, be it professional or personal. But the question which requires a

great deal of consideration is “Were the women had to face the same differentiation since the beginning of human civilization, if not then when did it start?” This question carries a great deal of relevance to this work because it will help us to understand and analyse the current trend of judicial activism because history is the bridge that connects the past with the present and without it, we have no future¹ or to put in the words of David C. McCullough stated, “History is a guide to navigation in perilous times. History is who we are and why we are the way we are”.

Status of Women In Ancient Age

During the ancient rig Vedic period, in the ancient Indus valley civilization, the evidence shows that the position of wife was respected and during religious ceremonies, the position of wife was given due acknowledgement. During that time, one of the most important qualifications for the marriage of a girl was her education qualification. There is also evidence that shows that in Rig Vedic society, the dowry system was unknown. The evidence available of the Gupta age shows that the girls belonging to the noble families as well as the girls who live in hermitages used to study works on ancient history and legends. Rig Veda recognised and emphasised the right of unmarried daughters to succeed in their father’s property. However, the same was not applicable to the married daughters as they were considered to be the property of their husbands. So, it can be said that during the ancient times, the early Vedic period, in particular, the status of women was respected and we were treated on a similar line to males with some exceptions.

Status of Women During Medieval Age

The Indian history from 700 AD to 1857 AD is considered a medieval age. This time was eminently characterised as a rule by Muslim invaders. With the kickstart of the Delhi Sultanate's rule in the country, the social life of the women completely changed. The social movement of the woman was restricted. Women were prohibited to attend public functions

¹ Johann N. Neem, ‘Connecting Past to Present: The History Major in Our Communities’ (*American Historical Association*) <<https://www.historians.org/teaching-and-learning/why-study-history/careers-for-history-majors/connecting-past-to-present>> accessed 25 April 2022

and they were not free to participate with men as equals in religious ceremonies. Unlike the earlier period, Women in the medieval age were generally considered mentally inferior. From the practices of this age, it is clear that The men's duty was to obey her husband blindly. At the end of the ancient age, their marriage age was reduced resulting in a hindrance to their education. In middle age, women were well denied the right to study the Vedas, which only men had access to. Reducing the marriageable age for girls even destroys their opportunities for higher education. Due to the invasions of Muslim rulers, many social evils such as female infanticide, child marriages, the *parda* system or sati, etc. were on a rampage during the Middle Ages due to the political instability in northern India. Thus, women came to be regarded as chattel and a tool for sensual satisfaction.

Status of Women During Modern India

In colonial India, Due to the intellectual progress towards modernising society through science or what is commonly called the Renaissance in the 18th and 19th centuries, the demand for the establishment of an egalitarian society was more pressed so that men and women can live as equals in the society. In India, with the advent of colonial powers, the cast order which was very rigid and very prevalent during the mediaeval times was challenged. During the advent of the British Empire in India, the position of women in India was at its nadir as various evil practices, which are mentioned above were strictly followed. The Britishers decided to undertake some bold steps to reform the caste-ridden Indian society. Some of these measures include the abolition of sati, the widow remarriage act, and the Arya Samaj movement. Thus, it is correct to say that though the British colonial powers exploited India they laid the foundation stone for the upliftment of women from the social injustice, and bad conditions of their life. The author submits that the present-day situation, though better than in earlier days is not even satisfactory and requires constant support from the legislature, executive and judiciary, and of course, "US". This part is dealt with by the author in detail in the latter part of this work.

JUDICIAL ACTIVISM: JOURNEY FROM 1950 TO 2022

The judiciary is considered the '*Sentinel on The Qui Vive*' because it is the conscience keeper of the society by virtue of the power conferred by the constitution of India by virtue of provisions such as Article 32² I.e. Writ Jurisdiction of SC, Article 142³ I.e. Power to DO Complete Justice, etc.

At this juncture, the author feels pertinent to submit the constitutional provisions and safeguards regarding women's rights and upholding gender equality.

The Provisions are as follows:-

- Preamble⁴: The preamble to the constitution of India provides for social economic and political justice, equality of status and opportunity, and dignity for the individuals. Thus, the framers of the constitution have at the very outset the constitution cleared that every citizen, be it man or woman or third gender, is equal and they should be treated as equals.
- **Article 14⁵**: It ensures the woman's right to equality. According to this provision, if any state action is discriminatory to the woman, the courts can strike down that particular action being contrary to the express provision of the constitution.
- **Article 16⁶**: It provides for "*equality of opportunity for all citizens in matters relating to employment or appointment to any office.*"
- **Article 15 (3) and (4)⁷**: Directs the state to prohibit all forms of gender discrimination and to promote women's empowerment by adopting positive steps.
- **Directive Principles of State Policy**: Part IV of the constitution provides for clear and unambiguous directions to the government to promote equality. It has been characterised as an obligation upon the government to consider applying these

² Constitution of India, 1950, art.32

³ Constitution of India, 1950, art.142

⁴ Constitution of India, 1950, Preamble

⁵ Constitution of India, 1950, art.14

⁶ Constitution of India, 1950, art.16

⁷ Constitution of India, 1950, art.15(3) and art.15(4)

provisions while enacting legislation. Though these are not justifiable in the Court these are essential for governance as held by Hon'ble SC in a catena of judgements. For eg. Article 39 (a), (d), 39A, 42⁸ etc.

To understand the approach of the judiciary in upholding women's rights, and promoting gender justice so as to lessen the injustices faced by women, the author will bifurcate landmark cases pronounced by the judiciary into two fields: firstly, cases pertaining to personal laws and secondly, pertaining to Non-Personal Laws.

CASES PERTAINING TO PERSONAL LAWS

*Mohd. Ahmed Khan v Shah Bano Begum*⁹

For the purpose of brevity, the author is keeping the facts at the hand in brief. The facts are such that the respondent in the instant case was married to the appellant and out of wedlock they had three sons and two daughters. In 1975, she was thrown out of her matrimonial house consequently, she filed the petition for maintenance before the court under section 125¹⁰ of CrPC. The court ordered the maintenance of Rs. 25/- and the same was challenged by the husband before the HC but the HC also dismissed the appeal and rather increased the amount from 25 to 179. Aggrieved by the same, the appellant filed the appeal before the SC. The judgement was delivered by the then CJI, Y.V. Chandrachud J. in the judgement it has been clearly mentioned that this is a clear case of gender inequality¹¹. The SC decided in favour of the respondent and ordered maintenance of Rs. 3000/- and held that the provisions of S.125 CrPC is a secular provisions and can be applied in cases filed by Muslim females also.

*Smt. Sarla Mudgal, President v Union Of India & Ors*¹²

In the instant case, a Hindu male first married a Hindu woman under Hindu law but being desirous of a second marriage he converted to Islam. His conversion to Islam was just for the

⁸ Constitution of India, 1950, art.39(a), art.39(d), art.39A, and art.42

⁹ *Mohd. Ahmed Khan v Shah Bano Begum* (1985), AIR 945

¹⁰ Code of Criminal Procedure, 1973, s 125

¹¹ *Mohd. Ahmed Khan* (n 9)

¹² *Smt. Sarla Mudgal, President v Union Of India & Ors* (1995), AIR 1531

purpose of undergoing a second marriage and after the completion of the second marriage, he waited back to Hinduism. The Supreme Court ordered that the second marriage would be invalid and hence be void and therefore the husband would be guilty of the offence under section 494¹³ IPC. The SC also discussed the right to life and personal liberty of Women.

Shabnam Hashmi v Union Of India (2014)¹⁴

The case pertains to the issue of adoption by a Muslim woman in her own name when personal laws prohibit such a practice. The SC while deciding refrained from interpreting a right to adopt as a fundamental right under article 21¹⁵ of the constitution. On the other hand, the SC stressed the UOI to implement the Uniform Civil Code so that women will have equal rights with men.

Geeta Hariharan v Reserve Bank Of India¹⁶

The SC while interpreting Section 6(a)¹⁷ of the HMGA, 1956 held that the word “after” as written in the provision held that the mother cannot be said to be the natural guardian only after the death of the father as it would be discriminatory for the woman but in utter violation of international conventions such as CEDAW, UDHR, ICCPR, etc¹⁸.

Shayara Bano v Union of India¹⁹

The instant case pertains to the constitutional validity of the practice of Triple talaq. The SC gave a split verdict (3:2) in favour of prohibiting this anti-women practice. The most interesting thing to note here is that the minority opinion as given by Kehar J. Includes a very interesting development in the field of constitutional law to uphold women's rights. The

¹³ Indian Penal Code, 1860, s 494

¹⁴ *Shabnam Hashmi v Union Of India* (2014) Writ Petition (Civil) No. 470/2005

¹⁵ Constitution of India, 1950, art.21

¹⁶ *Geeta Hariharan v Reserve Bank Of India* (1999) 2 SCC 228

¹⁷ Hindu Minority and Guardianship Act, 1956, s 6(a)

¹⁸ Rossel Aggarwal, ‘Geeta Hariharan v Reserve Bank of India’ (Jus Corpus Law Journal, 4 October 2021)

<<https://www.juscorpus.com/githa-hariharan-anr-v-reserve-bank-of-india-anr/>> accessed 28 April 2022

¹⁹ *Shayara Bano v Union of India* (2017) 9 SCC 1

minority decision used article 142 of the Indian Constitution to stop the Muslim men to practice their fundamental rights under article 25²⁰.

NON-PERSONAL LAW CASES

*Air India v Nargesh Mirza*²¹

The Hon'ble SC in the present case was confronted with the question of the validity of the retirement clause of Air India. According to it, an air hostess will be compulsorily retired on 1) attaining the age of 35 years; 2) if married within the first four years of service; 3) on first pregnancy. The Hon'ble SC held such a retirement clause to be arbitrary and violative of the constitution.

*Railway Board v Chandrima Das*²²

In this case, a Bangladeshi national was gang raped by the employees of the Indian Railway in a room at Yatriniwas at Howrah Station. The Hon'ble SC made Union Government pay the victim the compensation of Rs. 10 Lakhs and also held that such an act was against article 21 of the constitution which is available even to non-citizens.

*Mackinnon Mackenzie v Audrey D'costa*²³

The first major judgment on the Equal Remuneration act had been delivered by the Supreme Court in this case. In this case, Audrey, a lady stenographer, sued her company under the equal remuneration act as she was paid less than the male stenographer. Upholding her right to equal wages as a part of the right to equality the SC ordered to pay her equal as a male stenographer.

²⁰ Constitution of India, 1950, art.25

²¹ *Air India v Nargesh Mirza* (1981) 4 SCC 335

²² *Railway Board v Chandrima Das* (2000)

²³ *Mackinnon Mackenzie v Audrey D'costa* (1987), AIR 1281

*Vishaka v State of Rajasthan*²⁴

It is considered to be a milestone in the field of protecting women's rights by the judiciary in the country. It was after this case, that an urgent need was felt to recognise and protect the rights of women in the workplace and to protect women from sexual harassment of women in the workplace in particular. In this judgement, the Hon'ble SC laid down certain elaborative guidelines in order to curb the menace of sexual harassment of women in the workplace, and the same was held to be contrary to the constitutional values as enshrined under articles 15 and 21²⁵ of the Indian constitution. Accordingly, to be in compliance with Hon'ble SC the legislature enacted The Sexual Harassment Of Women At Workplace (Prevention, Prohibition and Redressal) Act, 2013.

CHALLENGES

1. **Lack of Representation:** The author is of the opinion that one of the main causes of gender injustice is the lack of women's representation in the decision-making process. For eg. The constitution which is the supreme law of the land was drafted by the constituent assembly which had no considerable female representation. However, the central government through the 73rd and 74th constitutional Amendment act mandated the one-third reservation of seats in the parliament for women. The need of the hour is adequate for women's representation in the judiciary as has been pointed out by the present Chief Justice of India.
2. **Loopholes in legal Structure:** Though the legislature has acted in a proactive way to enact a number of laws to protect women against all sorts of violence yet there has been an exponential increase in crimes against women. This is, according to the author, due to delays in the legal procedures and the presence of several loopholes in the functioning of a judicial system.
3. **Patriarchic Perspective:** Even today, the majority of Indian society has a patriarchal mindset. This has led them to believe that they are the rulers and will impose their

²⁴ *Vishaka v State of Rajasthan* (1997), AIR 3011

²⁵ Constitution of India, 1950, art.15 and art.21

diktat upon others and guard the unjust traditions. They are of an archaic world who thinks that the world is stagnant and needs to follow such unjust traditions. Hence, we need to change our perspective from a patriarchal to an egalitarian society.

4. **Lack of Political Will:** One of the main challenges in the way of promoting gender justice and equality is the lack of political will. Those who are responsible for making laws for the betterment of society do not have the will to carry on their functions for the welfare of the public at large because of their fear to lose their vote banks. The same can be seen even in the Shah Bano case where the government enacted the law to invalidate the judgement rendered by the SC.

SUGGESTIONS AND WAY AHEAD

Despite there being stringent provisions in the law to protect women from injustices and upholding women's rights, we still see that number of crimes is on a rampant increase in today's world. So it is high time that we need to adopt some way to deal with the issue otherwise, there will not be any second chance. Some of these suggestions are:-

- As it is said that the change begins with us, we need to replace the patriarchal system of the family with a more egalitarian society where both the male and female have equal representation and equal say in the decision-making.
- Since India is a democratic country where elections are held every five years and every adult has a right to vote, they should think and vote for those who have the 'Political Will' to take actions for the upliftment of the society, or otherwise we should reject them.
- The judiciary in association with the executive must pace up with the process of appointing female judges on the bench so that the decision which is related to the women directly can be delivered by them and can be more effective.
- Above all, as it has been pointed out by the author various times that there are laws but still the crime against women is on increase means that the implementation of these laws is not effective as it should have been. So, the government must act to bridge the lacunae in the implementation of such laws.

- As it is said, “Justice delayed is justice denied”. Efforts should be made with the aim to rejuvenate the justice delivery system to deliver fair and in- time justice to the victims of heinous crimes like rapes, acid attacks, sexual harassment, trafficking, and domestic violence.

CONCLUSION

According to the World Economic Forum's Global Gender Gap Report 2021, gender equality in India ranked 140th out of 153 nations. This clearly indicates the worrying state of affairs in India with respect to women’s position in society and the disparity between men and women. Without an iota of doubt, it is submitted that the social, economic, educational, political, and legal empowerment of women in India is going to be a Herculean task. It is not going to be easy to change the culture of disregard for women which are so deep-rooted in Indian society. But it does not mean that it is implausible. It can be achieved with the cooperation of the Judiciary, the Executive, and the legislature in addition to our own efforts. As it is said by our first Prime Minister of India, *Late Shri Pt. Jawahar Lal Nehru* that the development of a country is measured by the development of women. Also, it is imperative to note that India as a country cannot develop until all its sections and especially its vulnerable section I.e. women are not included in the process. To promote and check whether women have been included in developmental processes, the judiciary has to play a pivotal role, but this needs to be done by keeping in mind that judicial activism does not turn into judicial adventurism.